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In the Supreme Court of the United States

OCTOBER TERM, 1979

DAVID L. HEILMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA CRISCITELLI
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 157) is reported at 614 F. 2d 1133.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1980. The petition for a writ of certiorari was filed on April 9, 1980, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was convicted under an unconstitutionally vague statute that denied him fair notice that his conduct was unlawful.

2. Whether the evidence was sufficient to prove that petitioner acted willfully.

3. Whether petitioner made a prima facie showing of improper selective prosecution.

STATEMENT

Following a jury-waived trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 18 counts of willful infringement of the federal copyright laws, in violation of former 17 U.S.C. 1, 101(e), and 104.[1] He was sentenced to concurrent terms of six months' imprisonment and fined $9,000. The court of appeals affirmed (Pet. App. 157).

The evidence presented at trial is summarized in the opinion of the court of appeals (Pet. App. 157 at 2-5). The evidence showed that petitioner duplicated and sold copies of musical recordings that were originally recorded prior to February 15, 1972. He did so without receiving authorization from the holders of the copyrights. Petitioner claimed in the district court that this duplication was permissible under 17 U.S.C. 1(e) because he paid or attempted to pay a two cent royalty to the copyright holders for each record he copied.[2]

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the statutory provisions of the federal Copyright Act are unconstitutionally vague and that he was deprived of fair

[1]The relevant statutory provisions that were in effect at the time of petitioner's actions are set forth at Pet. 25-27. In 1976, the entire body of federal copyright law was rewritten, effective January 1, 1978. See Pub. L. No. 94-553, 90 Stat. 2560, 17 U.S.C. (Supp. I) 101 *et seq.*

[2]Under 17 U.S.C. 1(e), any person may make "similar use" of a mechanically recorded composition upon payment of a two cent royalty to the copyright holder.

notice that his conduct was unlawful. Petitioner's assertions are fully answered in the opinion of the court of appeals (Pet. App. 157), upon which we principally rely.[3]

As the court below explained, the Copyright Act of 1909, while protecting the holders of copyrights, allowed other persons to make "similar use" of a musical composition after an initial recording had been made. 17 U.S.C. 1(e). But as the courts of appeals have uniformly held, copying or exact duplication of sound recordings is not a protected "similar use" within the meaning of the statute. See *Heilman* v. *Bell*, 583 F. 2d 373 (7th Cir. 1978), cert. denied, 440 U.S. 959 (1979); *Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc.*, 507 F. 2d 667 (5th Cir.), cert. denied, 423 U.S. 841 (1975); *Jondora Music Publishing Co.* v. *Melody Recordings, Inc.*, 506 F. 2d 392 (3d Cir. 1974), cert. denied, 421 U.S. 1012 (1975); *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc.*, 497 F. 2d 285 (10th Cir. 1974) (en banc), cert. denied, 419 U.S. 1120 (1975); *Duchess Music Corp.* v. *Stern*, 458 F. 2d 1305 (9th Cir.), cert. denied, 409 U.S. 847 (1972).[4]

These holdings are predicated on a common-sense interpretation of the statutory language. Naked copying of recordings does not fall within the compulsory license provision, which permits "similar"—not "identical"—use of

[3]The Copyright Act has been amended to remove any possible doubt that unauthorized duplication of recorded musical compositions is forbidden. Under the new statute, duplication of all copyrighted sound recordings is explicitly prohibited regardless of when the original recordings were made. 17 U.S.C. (Supp. I) 114. Any future prosecutions will be instituted under the new statute. Accordingly, petitioner's arguments concerning the scope of the superseded statute do not present issues of continuing importance.

[4]No circuit has reached a contrary conclusion. Nothing has changed since this Court's denial of certiorari in the foregoing cases that would warrant granting review here.

the composer's work. As the court explained in *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc., supra*, 497 F. 2d at 288, "similar use" allows a company to "make its own arrangements, hire its own musicians and artists, and then record. It does not mean that [it] may use the composer's copyrighted work by duplicating and copying the record of a licensed recording company." See also *Heilman* v. *Bell, supra*, 583 F. 2d at 375-378; *Fame Publishing Co., supra*, 507 F. 2d at 669-670; *Jondora Music Publishing Co., supra*, 506 F. 2d at 395; *Duchess Music Corp., supra*, 458 F. 2d at 1310. Moreover, as the district court observed (Pet. App. 149), this interpretation comports with the congressional purpose to foster musical diversity by encouraging a variety of arrangements of a single composition. See also *Shaab* v. *Kleindienst*, 345 F. Supp. 589, 590 (D.D.C. 1972).

Petitioner's argument that he was denied fair notice that his activities were unlawful is untenable. Petitioner was warned that his actions were illegal by decisions of the Third, Fifth, Ninth, and Tenth Circuits—all rendered before he engaged in the acts charged in the indictment. Petitioner also received explicit notice from the public announcement of the government's intention to prosecute future acts of record piracy.[5] Indeed, petitioner sought a declaratory judgment and an injunction to restrain a criminal prosecution against himself; his motion for a temporary restraining order and a preliminary injunction was denied on April 28, 1975, the day before the occurrence of the first act of copyright infringement alleged in the indictment. See *Heilman* v. *Levi*, 391 F. Supp. 1106 (E.D. Wisc. 1975). Thus, petitioner had ample

[5]Petitioner concedes that he was aware of the policy of the Department of Justice to prosecute future copyright violations (Pet. 16).

notice that continuation of his record duplication business would subject him to criminal prosecution.[6]

2. Petitioner also argues (Pet. 9-15) that the evidence failed to establish that he acted willfully within the meaning of the statute. However, after carefully considering the evidence of intent, both courts below rejected that contention. Further review of this factual issue is unwarranted. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). In any event, the evidence amply supports the finding of the lower courts that petitioner acted with knowledge that his behavior was unlawful. As the court of appeals explained (Pet. App. 157 at 8-9):

> In determining [willfullness] * * * it is relevant to examine the critical facts known by the defendant. First of all he knew that the musical compositions which he duplicated were copyrighted. He knew that in January 1975 the Department of Justice had announced a prospective policy to prosecute persons who had made and sold pre-February 15, 1972, duplications. He knew that four Circuit Courts of Appeals had ruled in civil cases that such record duplications constituted copyright infringement. Judge Reynolds had refused to grant him a preliminary injunction because the judge considered

[6]In light of the consistent line of decisions of the courts of appeals, the government's explicit announcement of its prosecution policy, and the district court's denial of petitioner's claim for injunctive relief, petitioner's argument that a judicial interpretation has been applied "retroactively" is plainly without merit. Moreover, in light of the litigation on this very issue in which petitioner and his company were directly involved (*Heilman* v. *Levi*, 391 F. Supp. 1106 (E.D. Wis. 1975); *E-C Tapes, Inc.* v. *Kelly*, 412 F. Supp. 245 (N.D. Ill. 1975)), petitioner is in no position to claim that he lacked "fair warning" that his behavior was in violation of the law. See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963).

> the Copyright Act to forbid defendant's record duplication activities. Finally, defendant knew that his conduct had been ruled illegal under the laws of New York, California, and Wisconsin * * *. Instead of conforming his conduct to the bounds of the law, defendant chose to persist in conduct which he knew had "a high likelihood of being held by a court of competent jurisdiction to be a violation of a criminal statute." That is surely sufficient to meet the accepted definitions of willfulness.[7]

3. Petitioner finally argues (Pet. 15-19) that he was improperly denied an evidentiary hearing on his claim of selective prosecution. However, as the court of appeals correctly concluded, petitioner failed to make a prima facie showing that his prosecution rested on impermissible criteria (Pet. App. 157 at 10-11).

Contrary to petitioner's assertion, the fact that he criticized the Department of Justice's prosecution policy and is the only person to be prosecuted under the former statute for duplicating pre-1972 recordings is not itself prima facie evidence of improper selective prosecution. Petitioner offered no evidence suggesting that he was prosecuted for exercising First Amendment rights. As the court of appeals explained, petitioner was prosecuted as a result of his open and flagrant violation of law—not

[7]The courts below also properly rejected petitioner's assertion that he relied in good faith on the advice of his attorneys. As the district court found (Pet. App. 151-152): "I believe that the defendant went to these two lawyers * * * not for the purpose of obtaining legitimate legal advice as to what his actual prospects were; rather, he went to them as part of an elaborate orchestration of his no willfulness defense."

because he had spoken critically of the government.[8] Indeed, petitioner cites no evidence indicating that other persons continued to duplicate records in violation of the Copyright Act following the government's announcement of its prosecution policy.

In sum, as the court of appeals observed (Pet. App. 157 at 10-11): "It is not improper for the Government to concentrate on those violations which appear most flagrant. * * * 'Aggressively displaying one's antipathy to the * * * system or daring the government to enforce [the law] does not create immunity from, or a defense to, prosecution.' " See also *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); *United States* v. *Scott*, 521 F. 2d 1188, 1195 (9th Cir. 1975); *United States* v. *Kahl*, 583 F. 2d 1351, 1354 (5th Cir. 1978); *United States* v. *Swanson*, 509 F. 2d 1205, 1208-1209 (8th Cir. 1975); *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (2d Cir. 1974).

[8]The present case is unlike *United States* v. *Falk*, 479 F. 2d 616 (7th Cir. 1973), where the government departed from its written prosecution policy in draft card possession cases by indicting a vocal opponent of the war in Vietnam. In contrast to petitioner, Falk presented a substantial amount of circumstantial evidence suggesting that he had been prosecuted vindictively for exercising his First Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA CRISCITELLI
Attorney

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